

## 2018 JLC/AA Training Conference

### MOTIONS ANALYSIS

#### 1. Read the relevant statutory sections and regulations

This sounds basic but it is essential. When you get a motion, identify and read the statutory provisions that articulate how, when, and why a motion should be granted or denied.

#### 2. Identify the relevant analysis

Board of Immigration Appeals cases set out a list of non-dispositive factors for determining whether or not a respondent rebutted the presumption of delivery, *Matter of M-R-A-*, 24 I&N Dec. 665, 673-75 (BIA 2008), established changed country conditions, *Matter of J-G-*, 26 I&N Dec. 161, 169 (BIA 2013), or warrants *sua sponte* reopening, *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999). Court of Appeals cases discuss these standards in detail as well. *See, e.g., Salim v. Lynch*, 831 F.3d 1133, 1138-39 (9th Cir. 2016) (discussing changed circumstances).

You can locate an applicable BIA decision by searching through the a local shared drive (a decision with analogous issues) or by using Westlaw and searching for the test—for example, (“notice” /s “factors”) or (“exceptional circumstances” /s reopen). I think the Westlaw approach is a better approach for two reasons. First, you can identify a published Circuit Court decision reviewing the test. Second, you can determine, through published *and* unpublished Circuit Court decisions whether the test remains good law. This is particularly important for discretionary analyses because the BIA often carried forward old tests into new forms of relief, so the seminal case may refer to a now defunct form of relief—circuit law can clarify confusion on this score.

#### 3. Verify that the analysis you identified is good law

If you pull a decision from the shared drive or intraweb JLC Decision Bank, cite check it. If you identified the test from Westlaw, there is no need to recheck before drafting.

I think it is helpful practice to identify one or two unpublished Ninth Circuit cases that recently looked the analysis you intend to apply to see what reviewing Courts are looking for and/or concerned about. This is a good way to very quickly identify common mistakes—this is extremely difficult to do if you rely on the shared drive, where there are definitely mistakes. You can also identify good cases to use as parentheticals.

#### 4. Ask yourself whether the motion is *timely*. If it is not, should the deadline be equitably tolled based on applicable Circuit case law?

Motions to reopen must be filed within 90 days of a final order of removal, unless the motion is based on lack of notice or changed country conditions. INA §§ 240(b)(5)(C), 240(c)(7)(C). Motions to reconsider must be filed within 30 days after the final order. INA § 240(c)(6)(B). Equitable tolling of these deadlines is generally available where a respondent was “prevented from filing because of deception, fraud, or error, as long as the [respondent] acts with due diligence in discovering the deception, fraud, or error.” *Iturribarria v. INS*, 321 F.3d 889, 898 (9th Cir. 2003).

## 2018 JLC/AA Training Conference

### 5. Think about the applicable standards of review

Motions to reopen are reviewed for “abuse of discretion” and limited to “ensuring that the agency relied on the appropriate factors and [p]roper evidence to reach [its] conclusion.” *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015) (citing *Arbid v. Holder*, 700 F.3d 379 (9th Cir. 2012); see INA § 242(a)(2)(B), (b)(4)). Thus, motions to reopen based on a lack of notice, exceptional circumstances, and changed country conditions are reversed only if the IJ “acted arbitrarily, irrationally, or contrary to law.” *Najmabadi v. Holder*, 597 F.3d 983, 986 (9th Cir. 2010). An immigration judge’s resolution of purely legal questions is reviewed *de novo*, while factual findings are reviewed for substantial evidence. *Id.*

Although the Ninth Circuit reviews the denial of a motion to reopen *sua sponte* for legal error, see *Bonilla v. Lynch*, 840 F.3d 575, 592 (9th Cir. 2016), “the decision of the [Board or IJ] whether to invoke its *sua sponte* authority is committed to [their] unfettered discretion.” *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

### 6. Analyze the evidence in the record systematically

Motions to reopen should be analyzed systematically. Taking notes on specific dates on a separate sheet of paper will help you think about the problem and see how a respondent’s claim fits with the objective evidence in the record.

### 7. Think about the simplest way to resolve the motion *before* drafting

A motion to reopen is akin to “a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden.” *INS v. Abudu*, 485 U.S. 94, 108 (1988). There are several independent and sufficient reasons to deny a motion to reopen. First, the movant may not establish *prima facie* eligibility for the underlying relief they seek. *Id.* at 104. Second, the evidence the movant submits with their motion may not be previously unavailable, material evidence—repeated, evidence that was available at the time of a prior hearing does not justify reopening a case. *Id.* at 105. Third, “in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (*prima facie* case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.” *Id.*

For example, if a respondent seeks to reopen their case based on changed country conditions to apply for asylum, there is no need to conduct a thorough analysis if the respondent has aggravated felony drug trafficking convictions and is statutorily ineligible for asylum. See INA § 208(b)(2)(B)(i). The court will still have to determine whether the respondent presented a *prima facie* case for withholding of removal or protection under the Convention Against Torture.

## 2018 JLC/AA Training Conference

### 8. Ensure that your decision includes and touches on all of the elements/factors

Draft your analysis and review it to ensure you touched on all relevant factors. There is no need to write an egis on each factor nor is there a need to explain where a standard originated—a short and plain statement of the applicable legal standard is best.

### 9. Review and edit your draft decision

Make sure to review your written work product thoroughly. By the time you have finished a motion, you will be the person most familiar with the record and you are best positioned to identify and correct errors.

Editing your work on hardcopy is highly recommended—you will catch mistakes missed by reviewing an electronic version alone.